

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

JAYLEN BRANTLEY and JARED
NICKENS,

Plaintiffs,

V.

EPIC GAMES, INC., JOHN AND JANE
DOES 1 THROUGH 50, and JOHN DOE
CORPORATIONS 1 THROUGH 10,

Defendants.

CASE NO. 8:19-cv-00594-PWG

The Honorable Paul W. Grimm

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT EPIC GAMES, INC.'S
MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**

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Defendant Epic Games, Inc. (“Epic Games”) submits this memorandum in support of its motion to dismiss the First Amended Complaint, Dkt. No. 18, of Plaintiffs Jaylen Brantley (“Brantley”) and Jared Nickens (“Nickens”) (collectively, “Plaintiffs”).

I. INTRODUCTION

For the reasons set forth in Epic Games’ pre-motion letter to the Court, Dkt. No. 21, and elaborated on in this motion, Plaintiffs’ suit should be dismissed in its entirety. Plaintiffs’ attempt to impose unprecedented liability for violating rights that they do not and could not hold should be denied as inconsistent with established law.

Plaintiffs’ suit is based on the assertion that they have a monopoly on a basic dance move—crossing and stepping back and forth on each foot while pumping one’s hands up and down in front of the torso (the “Dance Step”). Plaintiffs allege that Epic Games violated their rights by including the Dance Step in its massive, complex battle royale video game, *Fortnite*, as the “Running Man” emote (the “Emote”) (one of hundreds of tiny customizations allowing players’ avatars to celebrate on the battlefield). As this Court is aware, Plaintiffs’ original complaint (Dkt. No. 1) (“Org. Compl.”) asserted *copyright*, right of publicity, and federal unfair competition claims. The day after Epic Games submitted a pre-motion letter to this Court detailing how those claims were deficient, Dkt. No. 17, Plaintiffs amended their complaint by dropping the copyright infringement claims in tacit recognition of their deficiency. But Plaintiffs’ withdrawal of their copyright claims does not save their other claims from Copyright Act preemption. For this and other reasons, Plaintiffs’ claims fail as a matter of law and this lawsuit merits dismissal.

First, despite Plaintiffs’ withdrawal of the copyright claims and their attempt to re-plead their claims to remove their admissions that the Dance Step is a “dance,” Plaintiffs’ right of

publicity (Count I), unfair competition (Counts II and III), unjust enrichment (Count IV), trademark infringement (Counts V and VI), and false designation of origin (VIII) claims are preempted by the Copyright Act. Both prongs of the preemption analysis are met here. The **first prong** asks whether the work is within the general subject matter of copyright. As dance is copyrightable subject matter, the Dance Step satisfies the first prong. Plaintiffs' recharacterization of the Dance Step in the Amended Complaint as a "movement" does not change that analysis for the purposes of preemption; it does not matter whether a particular movement is copyrightable or not, because a work need only have the potential to fit within a broad sense of one of the copyrightable categories (here, choreography). Moreover, Plaintiffs allege that the Dance Step is "exemplified in Plaintiffs' YouTube video," Am. Compl. ¶ 27, which also is within the subject matter of copyright and provides an independent basis for satisfaction of the first prong. The **second prong** asks whether the claims seek to vindicate rights equivalent to those protected by copyright law. Here, each of Plaintiffs' claims is premised on Epic Games' alleged "copying" of the Dance Step in *Fortnite*. As the ability to prevent reproductions is the quintessential exclusive right under the Copyright Act, both prongs are satisfied. Thus, these claims are preempted and should be dismissed for this reason alone.

Second, in addition to being preempted, Plaintiffs' right of publicity claim (Count I) fails for the independent reason that Plaintiffs cannot state a claim under the applicable law, and because such claims are barred by the First Amendment, which protects expressive works like *Fortnite*. See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("[V]ideo games qualify for First Amendment protection."). Because Plaintiffs Brantley and Nickens reside in Massachusetts and New Jersey, respectively, their publicity rights are governed by the laws of those states. Massachusetts' right of publicity only protects a "name, portrait or picture." As the

Dance Step does not fall into these categories, it is not protected under Massachusetts law and Brantley has no right of publicity claim. Moreover, under New Jersey law, Nickens' right of publicity claim is barred by the First Amendment under the Transformative Use Test as Epic Games' alleged use of the Dance Step is in the context of a highly fanciful video game—and is performed in that game by characters who do not resemble Plaintiffs.

Third, Plaintiffs' unfair competition (Counts II and III), unjust enrichment (Count IV), trademark infringement and dilution (Counts V through VII), and false designation of origin (Count VIII) claims are barred by the First Amendment based on *Rogers v. Grimaldi* principles. Courts frequently grant motions to dismiss based on the application of the widely-adopted *Rogers* test. That test bars such claims in the context of expressive works unless a defendant's use has "no artistic relevance" to the underlying work or is "explicitly mislead[ing] as to the source or the content of the work." *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989). Here, the Emote is artistically relevant to *Fortnite* as it allows users' avatars to celebrate in the game as they might do in real life, by using what Plaintiffs assert is a culturally relevant dance step. Moreover, there can be no claim that *Fortnite* is explicitly misleading.

Fourth, Plaintiffs' trademark infringement and dilution claims (Counts V through VII) fail because Plaintiffs do not and cannot plausibly allege that they own a valid mark. Absent consistent use on specific goods, a person's "likeness" is not a mark as it does not identify the source of goods or services. Accordingly, because Plaintiffs have not alleged that they consistently used their likeness for the sale of goods or services, Plaintiffs cannot claim that the Dance Step constitutes a protectable trademark. Further, even if the Court were to assume that a "likeness" could constitute a mark, the trademark infringement and dilution claims fail as Plaintiffs did not and could not allege that they used the Dance Step as a source designation for

goods or services. Plaintiffs also cannot state a claim for trademark dilution as Plaintiffs do not allege—nor can they—that Epic Games uses the Dance Step as its own trademark.

Accordingly, Epic Games respectfully requests that the Complaint be dismissed. Further, as Plaintiffs amended their complaint with full knowledge of the bases for this motion and after reviewing Epic Games’ pre-motion letter requesting leave to seek dismissal of Plaintiffs’ original complaint, Dkt. No. 17, Epic Games requests that the dismissal be with prejudice. For the Court’s convenience, Epic Games has provided in its concurrently-filed motion a chart summarizing the application of each of Epic Games’ bases for dismissal of each claim.

II. FACTUAL BACKGROUND

Plaintiffs allege that they created in early 2016 a “highly popular dance” that they refer to as the “Running Man.” Am. Compl. ¶¶ 1, 9. Plaintiffs allege that they performed the Dance Step during their appearance on *The Ellen DeGeneres Show* (the “Ellen segment”) and in a video that Plaintiffs posted to the Internet in April 2016 (the “2016 YouTube video”). Am. Compl. ¶¶ 1–2; *see* Ex. A (*Ellen* segment); Ex. B (2016 YouTube video).¹ During the *Ellen* segment and the 2016 YouTube video, Plaintiffs perform the Dance Step by taking small steps back and forth, with their left feet crossed behind their right feet, and with their hands in closed fists pumping slightly up-and-down in front of the torso. During every performance of the Dance Step referred to in the Complaint, the song “My Boo” by Ghost Town DJs plays in the background.

Plaintiffs allege that Epic Games appropriated the Dance Step in its *Fortnite* video game. Am. Compl. ¶ 1; Ex. C (copy of the *Fortnite* video game). In *Fortnite*, up to 100 players, alone, in pairs, or groups, compete to be the last player or group alive. Am. Compl. ¶ 17. The game features an extensive world in which players explore, build, and destroy, and also battle against

¹ Epic Games twice requested a copy of the 2016 YouTube video from Plaintiffs, but they have not provided it. Thus, Epic Games attaches the video that it believes is referenced.

each other via player-to-player combat. *See* Ex. C. Players choose to represent themselves in the game world by picking an avatar and customizing it as desired. *Fortnite*'s avatars feature a variety of human features, non-human features (such as a tomato head or animal head), costumes, and weapons. *Id.* They do not resemble Brantley or Nickens, as is shown below:



After *Fortnite*'s release in 2017, Epic Games continued to make new content available as part of different "Seasons." Am. Compl. ¶ 26. This includes "emotes," which are movements that an avatar performs to express emotions in the game. *Id.* ¶¶ 18–21. There have been over 100 emotes. Plaintiffs allege that the Emote—which was not included as an option until Season 5 in 2018 and is not available for download in the current *Fortnite* Season—violates their rights. *Id.* ¶ 26; Ex. D (video excerpt of the Emote).

Using the Emote, an avatar trots back and forth on each leg, with both feet facing forward and with the left foot directly back behind the right foot (rather than having both feet turned out with the left foot crossing behind and past the right foot as in Plaintiffs' performances of the Dance Step). Unlike the Dance Step, in the Emote the avatar's hands first bounce up and down in front of the chest, and then rise up to the avatar's face before extending down towards the hips while opening the palm (rather than pumping consistently up-and-down in front of the torso). Whereas the song "My Boo" by Ghost Town DJs accompanies all demonstrations of the Dance Step referenced in the Amended Complaint, *Fortnite* does not include or reference the song. Compare Exs. A, B with Exs. C, D.

III. LEGAL STANDARDS

To survive a Rule 12(b)(6) motion to dismiss, the Complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiffs must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*, 556 U.S. 662 at 678. In reviewing the complaint in the context of a Rule 12(b)(6) motion, the court “need not accept unsupported legal conclusions, legal conclusions couched as factual allegations, or conclusory factual allegations devoid of any reference to actual events.” *Three M Enters., Inc. v. Texas D.A.R. Enters., Inc.*, 368 F. Supp. 2d 450, 454–55 (D. Md. 2005) (internal citations omitted).

As this Court has acknowledged, “[w]hen reviewing a motion to dismiss, ‘[t]he court may consider documents . . . attached to the motion to dismiss, if they are integral to the complaint and their authenticity is not disputed.” See *Littlejohn v. BWW Law Grp. & Assocs.*, No. 14 Civ. 1696, 2014 WL 6391119, at *3 (D. Md. Nov. 14, 2014) (Grimm, J.); see also *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (“documents incorporated into the complaint by reference” may be considered on a motion to dismiss); *Graham v. Stewart*, No. 16 Civ. 2578, 2017 WL 3995536, at *3 n.5 (D. Md. Sept. 8, 2017) (“While not provided by [plaintiff] directly, [the] complaint makes reference to the information contained in [certain] documents . . . the Court therefore assumes that [those] documents are incorporated by reference”).² Accordingly, this Court may consider Exhibit A (*Ellen* segment), Exhibit B (2016 YouTube video), Exhibit C (*Fortnite* videogame), and Exhibit D (video of the Emote), which are incorporated into the Complaint by reference, when deciding Epic Games’ motion.

² See also *Fillmore v. Blumhouse Prods., LLC*, No. 2:16 Civ. 04348, 2017 WL 4708018, at *3 (C.D. Cal. July 7, 2017) (relying on works referenced in, but not attached to, complaint).

As all that is necessary to grant Epic Games' motion are the works at issue, dismissal is appropriate. *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1248 (9th Cir. 2013) (affirming grant of motion to dismiss trademark claims on *Rogers* grounds); *Rosciszewski v. Arete Assocs., Inc.*, 1 F.3d 225, 230 (4th Cir. 1993) (affirming grant of motion to dismiss on preemption grounds); *Mitchell v. Cartoon Network, Inc.*, No. 15 Civ. 5668, 2015 WL 12839135, at *3 (D.N.J. Nov. 20, 2015) (granting motion to dismiss right of publicity claims on Transformative Use grounds, noting "the only pieces of evidence needed to decide [whether the use is transformative]" are the works at issue); *Cummings v. Soul Train Holdings LLC*, 67 F. Supp. 3d 599, 606–07 (S.D.N.Y. 2014) (granting motion to dismiss trademark claims on *Rogers* grounds); *Louis Vuitton Malletier S.A. v. Warner Bros. Entm't Inc.*, 868 F. Supp. 2d 172, 184–85 (S.D.N.Y. 2012) (same); *Mays & Assocs., Inc. v. Euler*, 370 F. Supp. 2d 362, 371 (D. Md. 2005) (granting motion to dismiss Lanham Act unfair competition claim on preemption grounds); *Wharton v. Columbia Pictures Indus., Inc.*, 907 F. Supp. 144, 145–146 (D. Md. 1995) (same).

IV. ARGUMENT

For the reasons set forth below, Plaintiffs cannot plead facts sufficient to support their claims and this lawsuit should be dismissed in its entirety. **First**, Counts I through VI and Count VIII are preempted by the Copyright Act and should be dismissed for this reason alone. *See infra* 8. **Second**, Plaintiffs' right of publicity claim (Count I) fails because Plaintiffs cannot state a claim under the applicable law, *see infra* 11, and because that claim is barred by the First Amendment. *See infra* 14. **Third**, Plaintiffs' unfair competition, unjust enrichment, trademark infringement, trademark dilution, and false designation of origin claims (Counts II through VIII) are barred by the First Amendment under *Rogers v. Grimaldi*. *See infra* 18. **Fourth**, Plaintiffs' trademark infringement and dilution claims (Counts V through VII) fail because Plaintiffs have

not alleged ownership of a valid trademark. *See infra* 23. Moreover, Plaintiffs’ trademark dilution claim (Count VII) fails for the independent reason that Plaintiffs have not and could not allege that Epic Games has used their alleged trademark as a source identifier for Epic Games’ own goods or services. *See infra* 24.

A. Plaintiffs’ Claims Are Preempted by the Copyright Act

Plaintiffs’ right of publicity (Count I), unfair competition (Counts II and III), unjust enrichment (Count IV), trademark infringement (Counts V and VI), and false designation of origin (Count VIII) claims are preempted by the Copyright Act, and should be dismissed for this reason alone. The Copyright Act provides the exclusive remedy for “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright.”

17 U.S.C. § 301(a). A claim is preempted if (1) the work is within the “subject matter of copyright” and (2) the claim seeks to vindicate rights equivalent to those protected by copyright law. *Rosciszewski*, 1 F.3d at 229.

As to the first prong, Plaintiffs’ claims are predicated on the same Dance Step that formed the basis of their original copyright claim and that they alleged is protected by copyright law. *See* Am. Compl. ¶¶ 37, 45, 53, 61, 64, 74 (claims based on “use of the Running Man”); Org. Compl. ¶¶ 38–39, 49. Plaintiffs cannot save their claim by revising their Complaint to call the Dance Step a “movement” instead of a “dance.” Courts routinely hold that even elements of works that entirely lack protection under the Copyright Act—including “ideas,” “methods,” and “words and short phrases”—fall “within the ‘subject matter of copyright’ for the purposes of preemption analysis,” and thereby satisfy the first prong. *United States ex rel. Berge v. Bd. of Trs. of the Univ. of Ala.*, 104 F.3d 1453, 1463–65 (4th Cir. 1997) (holding that although “ideas and methods” are “specifically excluded from copyright protection,” claims based on such ideas

or methods are preempted); *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737, 754 (D. Md. 2003) (unfair competition claim based on appropriation of uncopyrightable numbers preempted even though “the numbers themselves [were] uncopyrightable”).³ This is because “scope and protection are not synonyms [and] the shadow actually cast by the [Copyright] Act’s preemption is notably broader than the wing of its protection.” *Berge*, 104 F.3d at 1463.

As choreography is the subject matter of copyright, 17 U.S.C. § 102(a)(4), the first prong is satisfied. *See Rosciszewski*, 1 F.3d at 229 (first prong satisfied by work within the scope of 17 U.S.C. § 102(a)); *see also Nat’l Basketball Ass’n v. Motorola Inc.*, 105 F.3d 841, 850 (2d. Cir. 1997) (“subject matter of copyright includes all works of a *type* covered by sections 102 and 103, even if federal law does not afford protection to them”). Indeed, like Plaintiffs here, the plaintiff in *Lions Gate Entertainment Inc. v. TD Ameritrade Services Co.* asserted unfair competition and trademark infringement ***based on the use of the famous dance lift*** from the film *Dirty Dancing* where Patrick Swayze lifts Jennifer Grey over his head. 170 F. Supp. 3d 1249, 1254 (C.D. Cal 2016). The claims were preempted as the lift was the subject matter of copyright. *Id.* at 1264.

Moreover, Plaintiffs allege that Epic Games “developed the Emote by copying the original [2016 YouTube] video.” Am. Compl. ¶¶ 28, 37. As an “audiovisual work,” the 2016 YouTube video is within the subject matter of copyright, providing an independent basis to satisfy the first prong. *See* 17 U.S.C. § 102(a)(6); *Fischer v. Viacom Int’l, Inc.*, 115 F. Supp. 2d 535, 540–41 (D. Md. 2000) (first prong satisfied as Plaintiff’s general “idea” for television

³ *See also Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004) (work “need not consist entirely of copyrightable material” to “meet the subject matter requirement, but instead need only fit into one of the copyrightable categories in a broad sense”); *Murray Hill Publ’ns, Inc. v. ABC Commc’ns, Inc.*, 264 F.3d 622, 633, 637 (6th Cir. 2001) (state law claims based on use of “a phrase or slogan not worthy of copyright protection” preempted), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010).

program embodied in copyrightable form, “even if the idea itself would not be protected”).

As to the second prong, the question is whether Plaintiffs’ claims include an “extra element” that “changes the nature of the action so that it is qualitatively different from a copyright infringement claim.” *Rosciszewski*, 1 F.3d at 229–230 (internal quotation marks omitted) (second prong satisfied, and state law claim preempted, because the “core of [the] cause[] of action” is “unauthorized copying”). Here, no such extra element makes Plaintiffs’ claims qualitatively different from a copyright claim. In fact, Plaintiffs explicitly describe the allegedly infringing acts as the quintessential act of copyright infringement: “copying.” Am. Compl. ¶¶ 37, 45, 53, 61, 64, 74. Accordingly, Plaintiffs’ claims, whether based on right of publicity, unfair competition, trademark infringement, or unjust enrichment laws, are preempted. *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1144 (9th Cir. 2006) (affirming dismissal of right of publicity claims on preemption grounds); *Thomas v. Artino*, 723 F. Supp. 2d 822, 835 (D. Md. 2010) (unjust enrichment claim preempted when claim based on “unauthorized reproduction and creation of derivative works”); *Lowry’s Reports*, 271 F. Supp. 2d at 755 (unfair competition claim preempted where claim amounted to “no more than the unauthorized public performance of (an uncopyrightable excerpt from)” plaintiff’s work); *Brown v. McCormick*, 23 F. Supp. 2d 594, 608 (D. Md. 1998) (common law unfair competition claim preempted as it “attempt[s] to vindicate the same rights that [plaintiff] pursues through [t]he Copyright Act”); *Wharton*, 907 F. Supp. at 146 (unjust enrichment claim preempted because it was “equivalent to the right to prepare derivative works” (internal quotation marks omitted)).⁴

Moreover, the “Supreme Court has extended this principle of copyright preemption to the

⁴ See also *Lewis v. Activision Blizzard, Inc.*, 634 F. App’x 182, 184 (9th Cir. 2015) (affirming dismissal of statutory right of publicity claim based on use in video game as preempted); *Lions Gate*, 170 F. Supp. 3d at 1267 (common law trademark claim preempted).

Lanham Act and federal trademark protection.” *Lions Gate*, 170 F. Supp. 3d at 1264 (citing *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33–38 (2003)). Plaintiffs’ Lanham Act claims (Counts V and VIII) are based on “Defendants’ unauthorized use of the [Dance Step],” Am. Compl. ¶ 64, which they allege was copied “to create the false impression that Epic started” the dance. *Id.* ¶ 33. The Supreme Court, however, has held that the Lanham Act’s phrase “origin of goods” “refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods.” *Dastar*, 539 U.S. at 37. Thus, when a “claim is more accurately conceived of as attacking unauthorized copying,” courts routinely dismiss such claims. *Slep-Tone Entm’t Corp. v. Wired for Sound Karaoke & DJ Servs., LLC*, 845 F.3d 1246, 1250 (9th Cir. 2017) (affirming dismissal of Lanham Act claim); *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1144 (9th Cir. 2008) (same); *Mays*, 370 F. Supp. 2d at 365, 370–371 (D. Md. 2005) (Lanham Act unfair competition claim preempted when based on the use of works “without [] authorization,” despite allegations that such use would cause confusion “as to the origin, sponsorship, or approval” of defendants’ services).⁵ Accordingly, Plaintiffs’ Lanham Act claims also are preempted.

B. Plaintiffs Cannot State a Right of Publicity Claim

In addition to being preempted by the Copyright Act, Count I fails for the independent

⁵ Preemption is particularly appropriate here because Plaintiffs’ alleged Dance Step is different from the Emote. *See supra* 5. Under copyright analysis, these differences would carefully be examined under the doctrine of substantial similarity, taking into account the appropriate scope of copyright protection for Plaintiffs’ alleged work. *Comins v. Discovery Commc’ns, Inc.*, 200 F. Supp. 2d 512, 518 (D. Md. 2002) (“In analyzing substantial similarity . . . the court must isolate the protectable expression in the copyrighted work in order to determine whether there are substantial similarities between that protected expression and the defendant’s work.” (internal quotation marks omitted)). But Plaintiffs improperly attempt to circumvent these well-developed copyright-law doctrines by disguising their claims under other causes of action, thus claiming a broad swath of rights that do not exist under the law.

reason that neither Brantley nor Nickens can state a right of publicity claim. Plaintiffs do not specify in the Complaint which state's right of publicity laws apply to their claim of "Invasion of the Right of Privacy (Publicity)" (Count I). Under Maryland's *lex loci delicti* choice-of-law principle, see *Laboratory Corp. of America v. Hood*, 395 Md. 608, 615 (Md. Ct. App. 2006), this Court must apply the laws of the Plaintiffs' respective domiciles. *Bullard v. MRA Holding*, 292 Ga. 748, 750 (Ga. Sup. Ct. 2013) (applying the law of the plaintiff's domicile to a right of publicity claim under the *lex loci* choice-of-law approach); *Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1446 n.6 (11th Cir. 1998) (same). Because Brantley and Nickens reside in Massachusetts and New Jersey, respectively, Am. Compl. ¶ 5, their publicity rights are governed by Massachusetts and New Jersey law.⁶

As a preliminary matter, all right of publicity claims must be carefully evaluated in light of the First Amendment principles that shield expressive works from liability. 2 Rights of Publicity and Privacy § 8:22–23 (2d ed.) ("[W]hen a video game is alleged to contain an infringement of a person's right of publicity, there must be a balancing in each case of the right of publicity claim against the policy of free speech."); see also *ETW Corp. v. Jireh Publ'g*, 332 F.3d 915, 931–32 (6th Cir. 2003) ("There is an inherent tension between the right of publicity and the right of freedom of expression under the First Amendment" and recognizing the need to "establish the boundaries between the right of publicity and the First Amendment"). Although some states account for First Amendment concerns through narrowly drafted right of publicity statutes with exemptions for "expressive works," others rely on judicially-created balancing tests to ensure that neither statutory nor common-law right of publicity claims run afoul of

⁶ That Plaintiffs plead their claims collectively, rather than individually, does not affect the choice-of-law analysis. See *Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1196–97 (S.D.N.Y. 1983) (applying California, Georgia, and Illinois right of publicity law to a single claim brought by multiple plaintiffs who resided in those states).

constitutionally protected free speech interests. *Compare* 42 Pa. C.S.A. § 8316(e)(2)(iii) (shielding “expressive works” from liability under Pennsylvania’s right of publicity statute) *with ETW*, 332 F.3d at 938 (First Amendment bars a common law right of publicity claim). Because Plaintiffs’ right of publicity claim is not recognized under the applicable statutory law, and because that claim cannot survive First Amendment scrutiny, Count I must fail.

Neither Massachusetts nor New Jersey law would recognize Plaintiffs’ right of publicity claim. Massachusetts recognizes a statutory right of publicity that prohibits the unauthorized use of only a plaintiff’s “name, portrait or picture.” Mass. Gen. Laws Ann. ch. 214 § 3A.⁷ Because there can be no assertion that the Dance Step is a “name, portrait, or picture,” Massachusetts law does not protect it and thus Brantley’s right of publicity claim fails for this reason alone. *See e.g., Cersani v. Sony Corp.*, 991 F. Supp. 343, 357 (S.D.N.Y. 1998) (dismissing statutory right of publicity claim where subject matter did not qualify as “name, portrait, picture, or voice” under statute).

Brantley’s right of publicity claim fails for the additional reason that Epic Games has not used Brantley’s “name, portrait, or picture” in a way that is recognizable as Brantley. The Massachusetts statute replicates almost exactly the language of New York’s right of publicity statute, the first of its kind. *Compare* Mass. Gen. Laws Ann. ch. 214 § 3A *with* N.Y. Civ. R. L. § 51.⁸ And in *Lohan v. Take-Two Interactive Software, Inc.*, the Court of Appeals of New York held that New York’s analogous right of publicity statute protects only against the use of a “name, portrait, or picture” when there is a “basis [to] conclude that the person depicted is capable of being identified [as the plaintiff]” through “identifying physical characteristics.” 31

⁷ Massachusetts does not recognize the common law right of publicity. *Ruggers, Inc. v. United States*, 736 F. Supp. 2d 336, 342 (D. Mass. 2010).

⁸ Massachusetts’ right of publicity statute is narrower than New York’s as it does not protect a person’s voice. *Compare* N.Y. Civ. R. L. § 51 *with* Mass. Gen. Laws Ann. ch. 214 § 3A.

N.Y.3d 111, 122–23 (N.Y. Ct. App. 2018) (no right of publicity claim where the use was a “generic artistic depiction” of a particular demographic that the court described as an “ambiguous representation[] [which was] nothing more than cultural comment”) (internal quotations omitted)). The mere performance of a Dance Step, standing alone, cannot serve to identify an individual person when, as Plaintiffs admit, “thousands” of people have posted social media videos of themselves performing the dance after being “challenged” by Plaintiffs to do so. Am. Compl. ¶ 11. Moreover, Plaintiffs’ admission during the *Ellen* segment that they ***did not create the Dance Step***, but rather learned of it after seeing a video of third parties Kevin Vincent and Jeremiah Hall performing the dance on Instagram, Ex. A at 2:30, further undercuts any argument that the performance of the Dance Step alone could make a fanciful avatar “recognizable” as either Brantley or Nickens themselves. *Lohan*, 31 N.Y.3d at 122–23; *see* Ex. A (*Ellen* segment). Because Plaintiffs do not and could not allege that the avatars in *Fortnite* are “capable of being identified” as Brantley himself, Brantley’s right of publicity claim should be dismissed for this reason alone. *Lohan*, 31 N.Y.3d at 122–23.

New Jersey similarly would not recognize Nickens’ right of publicity claim as New Jersey applies California’s Transformative Use Test to determine whether such claims are barred by the First Amendment. *Mitchell*, 2015 WL 12839135, at *4–5 (“The Third Circuit resolves conflicts between the First Amendment and right of publicity claims through a balancing analysis called the Transformative Use Test.” (citing *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 165 (3d Cir. 2013) and many California state court cases applying the test). Under the Transformative Use Test, a right of publicity claim does not lie where a “celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized” or the “product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own

expression rather than the celebrity’s likeness.” *Winter v. DC Comics*, 30 Cal. 4th 881, 888 (Cal. Sup. Ct. 2003); *Mitchell*, 2015 WL 12839135, at *4 (citing *Winter*). To apply the test, courts determine “whether the defendant’s use of a plaintiff’s likeness consists of merely a copy or imitation of the plaintiff or whether the defendant adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Mitchell*, 2015 WL 12839135, at *4 (internal quotation marks and citations omitted). When the defendant’s work “contributes significantly distinctive and expressive content,” the use is sufficiently transformative to merit First Amendment protection. *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47, 61 (Cal. Ct. App. 2006). Moreover, “[w]hen the value of the work comes principally from some source other than the fame of the celebrity—from the creativity, skill, and reputation of the [defendant]—it may be presumed that sufficient transformative elements are present to warrant First Amendment protection.” *Arenas v. Shed Media U.S. Inc.*, 881 F. Supp. 2d 1181, 1191 (C.D. Cal. 2011). Thus, the “potential reach of the transformative use defense is broad.” *Id.* at 1190.

The *Mitchell* decision is particularly instructive. In that case, the plaintiff—a “well-known figure in the video gaming community”—alleged that defendants used his likeness in an animated television series to create a character named Garrett Bobby Ferguson (“GBF”), who appeared in the series as a “giant floating head from outer space.” *Mitchell*, 2015 WL 12839135, at *1. The plaintiff pointed to several similarities between himself and the GBF character: both had “long black hair and a beard,” both shared a “similar backstory,” both “held records at video games,” and both were “portrayed as arrogant yet successful, beloved by fans, and willing to go to great lengths to maintain their titles.” *Id.* at *5. Nevertheless, the court held that the “less-than-subtle evocation of Plaintiff” in defendants’ television show was a transformative use

because, even if the defendants had used the plaintiff's identity, (a) defendants' GBF character was "not a literal representation of [plaintiff]" as it "[did] not match the Plaintiff in appearance," and (b) defendants' GBF character did not "do[] exactly what Plaintiff does in real life," but rather "[came] from a different planet, [played] a different game, [held] a different record, and [used] different methods to secure his high score." *Id.* at *5–6 (granting motion to dismiss).

The *Kirby* decision also is instructive. In that case, Kirby—the lead singer in the band "Deee-Lite"—alleged that her likeness had been used in Sega's Space Channel 5 video game to create a character named Ulala. 144 Cal. App. 4th at 51. She asserted that her likeness had been used because (a) she and Ulala shared similar physical features, (b) "Ulala's name is a phonetic variant of 'ooh la la,' a phrase often used by Kirby and associated with Kirby," and (c) "both Kirby and Ulala used the phrases 'groove,' 'meow,' 'dee-lish,' and 'I won't give up.'" *Id.* at 55–56. The court held that such use was transformative because, even if Sega had used Kirby's identity, (a) Ulala did not "merely emulate[] Kirby" given the differences between the plaintiff's physical characteristics and Ulala's such as their size, physique, hairstyle, costumes, and outfits; and (b) in the "setting for the game," Ulala was "a space-age reporter in the 25th century," and Kirby was not. *Id.* at 59–60.

Here, the transformative use is even clearer than in *Mitchell* and *Kirby*. Unlike those plaintiffs who alleged various similarities in physical characteristics, Plaintiffs' argument that Epic Games used Plaintiffs' likeness rests entirely on the Emote, which allows users' avatars to perform a dance step. Plaintiffs do not allege *any* similarities in physical characteristics between Brantley or Nickens and any *Fortnite* avatar. This is because the Emote can be performed by any of *Fortnite*'s myriad avatars, none of which resemble either Brantley or Nickens. *See supra* 8. The Emote also is different from the Dance Step both in the movements themselves and the

music that appears when the Emote is performed. *See supra* 5. Accordingly, *Fortnite* does not contain a “literal recreation” of Brantley or Nickens, but rather “added creative elements to create a new expression.” *Kirby*, 144 Cal. App. 4th at 59. This alone makes any alleged use of the Dance Step transformative. *See Mitchell*, 2015 WL 12839135 at *4; *Sivero v. Twentieth Century Fox Film Corp.*, No. B266469, 2018 WL 833696, at *10 (Cal. Ct. App. Feb. 13, 2018) (“Simpsonized” character with different physical characteristics than plaintiff was transformative use).

Moreover, just as the GBF character at issue in *Mitchell* did not “do[] exactly what [the plaintiff] does in real life,” *Mitchell*, 2015 WL 12839135, at *5, and just as the Ulala character at issue in *Kirby* was not a space-age reporter, Plaintiffs have not alleged that they have appeared in a similar setting to *Fortnite*—namely they have not fought in a battle royale using weapons to eliminate opponents. Am. Compl. ¶ 16. This also makes Epic Games’ use transformative. *See Mitchell*, 2015 WL 12839135, at *5 (use was transformative because “[defendants’ character] comes from a different planet [than plaintiff], plays a different game, holds a different record, and uses different methods to secure his high score”); *Kirby*, 144 Cal. App. 4th at 59 (use was transformative because the “setting for [defendants’] game” was “unlike any public depiction” of the plaintiff); *see also Hart*, 717 F.3d at 161 (noting that the use of a likeness alongside “fanciful characters, placed amidst a fanciful setting” would be “highly transformative”).

The Emote also is a miniscule part of *Fortnite*.⁹ *See supra* 4. This further supports a finding of transformativeness. *Mitchell*, 2015 WL 12839135, at *6 (use of a likeness that was

⁹ Count I also fails under Maryland law as the Emote is a tiny part of *Fortnite* and is incidental to the overall game. *Comins*, 200 F. Supp. 2d at 523 (D. Md. 2002) (“[T]he [right of publicity] tort does not apply to an incidental use of a person’s name or likeness.”). Moreover, Plaintiffs’ right of publicity claims would fail under Maryland law for the independent reason that such claims are barred by the First Amendment. *See supra* 14.

“placed in a larger story arc which is itself quite expressive” was transformative); *de Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845, 863 (Cal. Ct. App. 2018) (realistic depiction of plaintiff was transformative because it constituted only “4.2 percent” of the defendant’s work); *Sivero*, 2018 WL 833696, at *10 (use of plaintiff’s likeness was transformative in part because defendants’ character was “a minor character in the overall constellation of Simpsons characters”).

Finally, Plaintiffs concede that *Fortnite* became a popular video game long before the inclusion of the Emote, and thus that the game’s value comes from Epic Games’ creativity, skill, and reputation, not the Emote. Am. Compl. ¶¶ 14 (“prior to releasing *Fortnite* . . . Epic had already developed two popular video game franchises”), 16 (“On or around July 2017, Epic released the initial version of *Fortnite* . . .”), 24 (“Soon after its release, *Fortnite* became an international phenomenon.”), 26 (“On July 12, 2018 . . . *Fortnite* offered a new rare emote that it called the ‘The Running Man Emote.’”). This too shows transformative use. *See de Havilland*, 21 Cal. App. 5th at 864 (transformative use shown by successfulness of series’ “screenwriter, director, and producer”; “[a]ccomplished writers”; and “[h]ighly-regarded and award-winning actors”); *Sivero*, 2018 WL 833696, at *10 (transformative use as “success of *The Simpsons*” does not derive “primarily from [Sivero’s] fame”). Thus, the right of publicity claims fail and Count I should be dismissed.¹⁰

C. Plaintiffs’ Unfair Competition, Unjust Enrichment, and Trademark Claims Are Barred By The First Amendment

In addition to being preempted, Plaintiffs’ unfair competition (Counts II and III), unjust enrichment (Count IV), trademark infringement (Counts V and VI), trademark dilution (Count

¹⁰ Satisfaction of the Transformative Use test also requires dismissal of Plaintiffs’ unfair competition claim. *Kirby*, 144 Cal. App. 4th at 61.

VII), and false designation of origin (Count VIII) claims are barred by the First Amendment, which permits creators to use source identifiers like trademarks as part of expressive works like *Fortnite*. In *Rogers v. Grimaldi*, the Second Circuit held that claims such as these are barred unless the defendant's alleged use (1) has "no artistic relevance" to the underlying work or (2) is "explicitly mislead[ing] as to the source or the content of the work." 875 F.2d at 999 (2d Cir. 1989).

Courts across the country have applied the *Rogers* test to trademark infringement, trademark dilution, unfair competition, and unjust enrichment claims based on the use of source identifiers like trademarks in the content of expressive works like video games. See *Elec. Arts*, 724 F.3d at 1239–41 (9th Cir. 2013) (dismissing Lanham Act unfair competition claim based on the use of a football player's likeness in a video game based on *Rogers* analysis); *Dillinger v. Elec. Arts Inc.*, No. 1:09 Civ. 1236, 2011 WL 2457678, at *3–8 (S.D. Ind. June 16, 2011) (dismissing Lanham Act and common law unfair competition claims based on use of plaintiff's mark on an in-game purchase within a video game based on *Rogers*); see also *Twentieth Century Fox Television v. Empire Distrib., Inc.*, 875 F.3d 1192, 1200 (9th Cir. 2017) (affirming dismissal of trademark infringement, dilution, and unfair competition claims on *Rogers* grounds); *Moore v. Weinstein Co., LLC*, No. 3:09 Civ. 00166, 2012 WL 1884758, at *49 (M.D. Tenn. May 23, 2012) (dismissing unjust enrichment claim that "essentially overlap[ped] with [plaintiff's] publicity and trademark claims" as it was "subject to the *Rogers* test"); McCarthy on Trademarks and Unfair Competition § 31:144.50 (5th ed.) (*Rogers* test is "widely used" to balance "rights between the free speech policy of the First Amendment and the Lanham Act policy of preventing deception and confusion"). The *Rogers* test "applies equally to [] state law claims" as well as federal Lanham Act claims. *E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095,

1101 (9th Cir. 2008); *see also Sporting Times, LLC v. Orion Pictures, Corp.*, 291 F. Supp. 3d 817, 828 (W.D. Ky. 2017) (“[As] the First Amendment shields Defendants’ use of Plaintiffs’ Mark, [] state law may not inculcate the same use.”); *Yankee Publ’g Inc. v. News Am. Publ’g Inc.*, 809 F. Supp. 267, 282 (S.D.N.Y. 1992) (“[T]he same First Amendment considerations that limit a cause of action under the Lanham Act apply also to a cause of action under New York law.”).

As to the first prong, only a claim based on the use of a source identifier with “no artistic relevance to the underlying work whatsoever” can survive First Amendment scrutiny. *Rogers*, 875 F.2d at 999. The “threshold for ‘artistic relevance’ is purposely low” and “merely must be above zero” to meet the first *Rogers* prong. *Louis Vuitton*, 868 F. Supp. 2d at 178; *see also Dillinger*, 2011 WL 2457678, at *6 (“[I]t is not the role of the Court to determine how meaningful the relationship between a trademark and the content of a literary work must be . . . any connection whatsoever is enough.”). “This black-and-white rule has the benefit of limiting [courts’] need to engage in artistic analysis in this context.” *Elec. Arts*, 724 F.3d at 1243.

Here, emotes in general and the Emote in particular are artistically relevant to *Fortnite* as they directly enhance users’ gameplay experience by allowing them to express emotions within the game. *See, e.g., Novalogic v. Activision Blizzard*, 41 F. Supp. 3d 885, 900–01 (C.D. Cal. 2013) (use in video game artistically relevant because it added “to the enjoyment users receive from playing the complicated game”); *Louis Vuitton*, 868 F. Supp. 2d at 178 (use of fake Louis Vuitton bag in a comedy film was “artistically relevant” because one of the characters’ mispronunciation of “Louis Vuitton” “comes across as funny”). Plaintiffs themselves allege that the Dance Step is a “fam[ous]” and “popular[]” dance that “thousands of people” have performed. Am. Compl. ¶¶ 11–12. Epic Games’ alleged inclusion of the Dance Step and other

culturally-relevant dance steps in *Fortnite* thus enables players to perform the same kinds of popular dances and movements in the game that they might perform in real life. Plaintiffs even admit that this aspect of *Fortnite* is artistically relevant by acknowledging that “emotes (dances or movements)” are an essential feature of the game and “fundamental to *Fortnite*’s success.” Am. Compl. ¶¶ 18, 21. Plaintiffs also admit that *Fortnite*’s inclusion of emotes has become a part of the zeitgeist with professional athletes, young adults, teenagers, and kids “performing emotes.” *Id.* ¶ 21. This is more than sufficient to qualify for First Amendment protection given that even a “tenuous” association satisfies the first prong. *Roxbury Entm’t v. Penthouse Media Grp., Inc.*, 669 F. Supp. 2d 1170, 1173–74, 1176 (C.D. Cal. 2009) (use of the mark ROUTE 66 in an adult film was artistically relevant because the film’s story line, “to the extent there is one” concerned a young couple on the run); *see also E.S.S.*, 547 F.3d at 1100 (video game’s inclusion of strip club with similar name to plaintiff’s trademark was relevant to overall goal of creating a virtual depiction of East Los Angeles).

As to the second prong, a work is protected by the First Amendment unless “[its] creator uses the mark or material to explicitly mislead consumers as to the source or the content of the work.” *Elec. Arts*, 724 F.3d at 1245 (internal quotations omitted). When analyzing the second *Rogers* prong, courts look for some “explicit indication on the face of [the defendant’s work]” that is misleading to consumers, beyond the use of the trademark or likeness. *ETW*, 332 F.3d at 937; *Dillinger*, 2011 WL 2457678, at *6 (“To be ‘explicitly misleading,’ the defendant’s work must make some affirmative statement of the plaintiff’s sponsorship or endorsement, beyond the mere use of plaintiff’s name or other characteristic.”). In other words, the “slight risk that [the] use of a celebrity’s name [or likeness] might implicitly suggest endorsement or sponsorship to some people is outweighed by the danger of restricting artistic expression.” *Rogers*, 875 F.2d at

1000.

In a closely analogous case, the Southern District of Indiana considered a Lanham Act and common-law unfair competition claim based on the use of the DILLINGER mark on virtual weapons used in a series of video games based on the *Godfather* movies. *Dillinger*, 2011 WL 2457678, at *2–3. In the video games, players had the option to “choose and use a Tommy Gun identified as the Level Three ‘Dillinger Tommy Gun,’” which was “one of fifteen firearms in [the] game.” *Id.* at *3. Players also had the option to buy, through an in-game purchase, a “downloadable bundle of [add-on] weapons [that] include[d]” a separate virtual weapon labelled the “Modern Dillinger.” *Id.* After holding that the “attenuated” link between the Dillinger mark and the *Godfather* video games was sufficient to qualify as “artistic relevance,” *id.* at *4–6, the court held that the video games were not “explicitly misleading” because the plaintiff had failed to “point[] to [an] *explicit* misrepresentation” in the defendant’s work, which was “alone [] dispositive of [the] issue [of the second *Rogers* prong].” *Id.* at *6–8.

Here, as in *Dillinger*, Plaintiffs allege no misleading conduct by Epic Games other than use of the Dance Step. Moreover, Plaintiffs essentially admit that the Emote itself does not imply endorsement or sponsorship by Plaintiffs. Am. Compl. ¶ 27 (alleging that *Fortnite* players “believe[] the Emote was Epic’s original creation”). Further, the Emote is only a tiny part of *Fortnite*, *see supra* 4, which further militates against a finding that the game is explicitly misleading as to its source. *See E.S.S.*, 547 F.3d at 1100 (that the inclusion of plaintiff’s mark was “quite incidental to the overall story of the Game” supported the conclusion that the use was not explicitly misleading). As *Fortnite* is protected by the First Amendment, *see supra* 2 dismissal is appropriate. *See id.*; *Elec. Arts*, 724 F.3d at 1247–48 (affirming grant of motion to dismiss); *Metrano v. Twentieth Century Fox Film Corp.*, No. 08 Civ. 6314, 2009 WL 10672576,

at *5–6 (C.D. Cal. July 16, 2009) (granting motion to dismiss). Accordingly, Counts II through VIII should be dismissed.

D. Plaintiffs Cannot State A Claim for Trademark Infringement or Dilution

In addition to being barred by the First Amendment under *Rogers*, Plaintiffs’ trademark infringement and dilution claims (Counts V through VII) fail as Plaintiffs have not alleged a valid trademark. Moreover, Plaintiffs’ trademark dilution claim (Count VII) fails because Plaintiffs do not and could not allege that Epic Games has used their alleged trademark as Epic Games’ own trademark—that is, as a source identifier for Epic Games’ own goods or services.

1. Plaintiffs Have Failed To Adequately Allege A Valid Trademark

Plaintiffs’ trademark infringement and dilution claims (Counts V through VII) fail for the independent reason that Plaintiffs have not and could not allege that the Dance Step is a trademark for two reasons. **First**, “as a general rule, a person’s image or likeness cannot function as a trademark” because they are not “consistently used on specific goods.” *ETW*, 332 F.3d at 922–923; McCarthy on Trademarks and Unfair Competition § 10:39 (5th ed.) (“[T]here cannot be such an amorphous thing as a ‘trademark’ in a person’s likeness.”). Thus, “it cannot be said that every [representation of a person’s likeness] serves [the] origin-indicating function” that a mark must serve in order to qualify for protection as a trademark. *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 583 (2d Cir. 1990) (no trademark in likeness of Babe Ruth); *ETW*, 332 F.3d at 922–24 (no trademark in likeness of Tiger Woods). Plaintiffs’ trademark infringement claims (Counts V through VI), which are based on Epic Games’ alleged use of their “likeness,” Am. Compl. ¶¶ 65, 75, fail for this reason alone.

Second, Plaintiffs’ trademark infringement and dilution claims fail because Plaintiffs have failed to allege that they have used the Dance Step to identify goods or services, and thus

have not adequately alleged a valid trademark. Although Plaintiffs argue that they have acquired trademark rights through their “prominent and continuous use of the Running Man,” Am. Compl. ¶ 64, nowhere in the complaint do they allege the existence of any goods or services the source of which their alleged mark serves to identify. At best, Plaintiffs assert that the Dance Step has become a trademark for the Dance Step itself. Am. Compl. ¶ 73 (“Plaintiffs have used, and thereby own common law trademark rights in the Running Man.”). But “[t]rademark law is concerned with protection of the symbols, elements or devices *used to identify a product* in the marketplace . . . [i]t does not protect [a work] as a trademark for itself.” *EMI Catalogue P’ship v. Hill, Holliday, Connors, Cosmopulos Inc.*, 228 F.3d 56, 63 (2d Cir. 2000) (emphasis added); *Radiance Found., Inc. v. N.A.A.C.P.*, 786 F.3d 316, 327 (4th Cir. 2015) (“[Trade]marks are not goods or services but instruments to identify goods and services.”). When a plaintiff fails to allege that its claimed mark has been “use[d] . . . as a trademark . . . to differentiate or identify the origin of his goods or services,” any trademark infringement and dilution claims must fail. *Am. Express Co. v. Goetz*, 515 F.3d 156, 159–61 (2d Cir. 2008) (dismissing trademark infringement claims on this basis); *Hughes v. Design Look Inc.*, 693 F. Supp. 1500, 1501, 1506–08 (S.D.N.Y. 1988) (no trademark infringement where images were not “associated with any product or service”). Because Plaintiffs have failed to plausibly allege that the Dance Step is a trademark, Counts V through VII must fail.

2. Plaintiffs Do Not Allege Trademark Use By Epic Games

In addition to Plaintiffs’ failure to allege that *they* used the Dance Step as a trademark, Plaintiffs have not and cannot allege that *Epic Games* has used the Dance Step as a mark to identify the source of Epic Games’ own goods or services—that is, to identify the source of *Fortnite*. This also dooms Plaintiffs’ trademark dilution claim (Count VII). As explained in

Lions Gate and explicitly stated in the Lanham Act, a dilution claim requires that the defendant use “the allegedly famous mark as Defendants’ own mark or to identify Defendants’ services.” 170 F. Supp. 3d at 1270 (granting Rule 12(b)(6) motion with prejudice); *see also Nat’l Bus. Forms & Printing, Inc. v. Ford Motor Co.*, 671 F.3d 526, 536 (5th Cir. 2012) (dismissing dilution claim because “[defendant] did not ‘use’ Ford’s marks . . . in identifying or distinguishing its own goods or services”); *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 524 (S.D.N.Y. 2008) (dismissing dilution claim because “[defendant] has *not* used the TIFFANY mark to identity *its own* goods and services”) *aff’d*, 600 F.3d 93 (2d Cir. 2010); McCarthy on Trademarks and Unfair Competition § 24:122 (5th ed.) (“The [federal dilution] statute makes it clear that a nontrademark and nontrade name use of the accused designation cannot dilute.” (citing 15 U.S.C. § 1125(c))). As Epic Games is not using the Dance Step as its own mark or to identify its own services, Count VII should be dismissed.

V. CONCLUSION

Epic Games respectfully requests that the Complaint be dismissed. Moreover, as Plaintiffs amended their complaint after reviewing Epic Games’ pre-motion letter seeking leave to file a motion to dismiss the original complaint, Dkt. No. 17, Epic Games requests that the dismissal be with prejudice as further amendment cannot save Plaintiffs’ claims. *See Powell v. Wheaton WIC Center*, No. 18 Civ. 535, 2019 WL 528224, at *3 (D. Md. 2019) (Grimm, J.) (“[W]hen a plaintiff has had the opportunity to amend in response to a defendant’s identification of pleading deficiencies but still fails to state a claim, dismissal with prejudice is appropriate because another opportunity to amend would be futile.”).

DATED: May 30, 2019

/s/ Dale M. Cendali

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